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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL RAY BAIN,

Defendant and Appellant.

A104209

(Napa County  
Super. Ct. No. CR112556)

Daniel Ray Bain appeals from an order of restitution entered after his plea of no contest to one count of grand theft. He argues that the order improperly included fees incurred by the victim's attorney for assisting in the criminal prosecution, and that the order was based on vague estimates of the time spent by the victim's employees investigating defendant's crime. We find the evidence supports the order and that charging for the cost of the criminal prosecution was not improper and accordingly affirm.

BACKGROUND

Defendant was charged with three counts of grand theft of personal property and one count of unauthorized computer access and fraud. (Pen. Code, §§ 487, subd. (a), 502, subd. (c).)<sup>1</sup> The charges arose out of his activities while he was employed as the information technology officer for Clinic Ole, a nonprofit clinic for low income individuals. One of the theft charges concerned defendant's sale and retention of the

<sup>1</sup> All statutory references are to the Penal Code.

proceeds of a lap top computer belonging to Clinic Ole. Another theft charge was based on defendant's charge to Clinic Ole of \$12,912 for computer monitors that actually cost only \$10,853. Defendant kept the difference. The third theft charge was based on defendant's charge to Clinic Ole of \$61,117 for computers that actually cost only \$23,890. Defendant arranged the computer transactions through his own company without disclosing his profit and other details to his employer. The charge of unauthorized computer access and fraud related to defendant's use of the laptop and the clinic's Pay Pal account to arrange the sale on eBay.

On June 30, 2003, defendant, who was on probation for embezzlement, entered a plea of no contest to count three of the information with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 as to the remaining counts. In exchange for his plea, defendant was told he would receive a sentence of 16 months, with restitution to be decided by the court.

At the time of sentencing, the court reviewed the probation report and a letter from the attorney for Clinic Ole, Jennifer Holt. In her letter, Holt described the nature of defendant's crimes and summarized the services provided to Clinic Ole as a result of the crimes. She outlined losses from defendant's overcharging of the clinic for computers and the cost of hiring a computer company to make the computers operational. She also listed employee hours spent on the investigation of defendant's crimes and her own fees of \$19,314.11. The court sentenced defendant and ordered restitution in the amounts listed in Holt's letter. Defendant requested a hearing.

The restitution hearing took place on September 3, and September 25, 2003. Attorney Holt testified that Clinic Ole retained her law firm in connection with the thefts by defendant. Holt was formerly in-house counsel at Bank of America and an expert on fraud and embezzlement. Based on her professional experience, Holt believed that a civil suit against defendant would be complicated and expensive. Her strategy in the matter was to file a civil action against defendant, while simultaneously pursuing an investigation of the available evidence with the goal of convincing the police and district attorney's office to institute criminal charges. She hoped to avoid the cost of the civil

action, in light of her client's limited budget and nonprofit status, by allowing the criminal process to recover the losses caused by defendant's thefts.

Holt filed a civil complaint against defendant and pursued her strategy of convincing the authorities to act. Initially, the police were not enthusiastic about what they perceived as a purely civil matter. Both Holt and the employees of Clinic Ole expended many hours investigating defendant's activities. Due to the nature of the crime, the investigation consumed several months of time and involved the tracing of defendant's transactions through different bank accounts, obtaining a lien on his bank accounts and investigating the company defendant set up to purchase computers and sell them at a profit to Clinic Ole. She explained the time consuming efforts involved in locating and reviewing bank records. Eventually, Holt and the Clinic Ole employees gathered sufficient documentation to convince the police to refer the case to the district attorney for a criminal prosecution. All of the work Holt did would have been useful in the civil case, had it been necessary to pursue that case.

Holt testified that \$19,314.11 represented her fee after deducting the normal 15 percent discount the firm allowed nonprofit clients and then reducing the fee by 50 percent. She explained that she submitted only half the amount of her fee because she was trying to reflect the amount of time spent on matters that related solely to the civil action.

Following the testimony of several Clinic Ole officers and employees as to the time they spent investigating defendant's crimes and documenting the losses sustained, as well as organizing an independent audit and remedying the incomplete computer system delivered by defendant, the prosecutor argued that the entire amount of attorney fees and employee hours should be included in the restitution order. Defense counsel argued that defendant should not be required to pay for any hours devoted to the criminal action.

The court reviewed the provisions of section 1202.4 that provide for restitution of all economic loss caused by a defendant's criminal conduct. The court listed the economic losses incurred by Clinic Ole, including salaries paid by the nonprofit for work by its employees to uncover and remedy defendant's thefts and the full amount of

attorney fees, rather than the reduced amount that Holt had listed. A restitution order was entered on September 25, 2003, for a total amount of \$125,072.14. Defendant filed a timely notice of appeal, specifying that the appeal was taken from the restitution order.

## DISCUSSION

Defendant challenges the attorney fees and the amount of employee time included in the restitution order. He contends that the attorney fees were costs of his criminal prosecution, and that the amounts for employee time are based on vague unsubstantiated information. He specifically identifies as improper items of restitution the amount of attorney time spent on acting as a “conduit” for the prosecutor, preparation of witnesses that were subpoenaed for the criminal proceedings, and what he characterizes as “handholding” of witnesses prior to the restitution hearing. He argues that these activities are normally carried out by the prosecutor and may not be items of restitution. In addition, he contends that the amounts charged were based on information that was so vague as to constitute an abuse of discretion and a violation of due process. We find that the amounts charged by the court’s order were proper elements of restitution and were based on substantial evidence.

### Investigation and Legal Work By Private Counsel May Be Included in Restitution

Article I, section 28, subdivision (b) of the California Constitution states in part, “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.”

Section 1202.4, subdivision (f), one of the statutes that implements the constitutional provision, provides in relevant part: “In every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” Subdivision (f)(3) of the statute states that restitution: “shall be of a dollar amount that is sufficient to fully

reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following:

- (A) Full or partial payment for the value of stolen or damaged property. [¶] . . . [¶]
- (E) Wages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution. . . . [¶] . . . [¶]
- (H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim."

Defendant maintains that he was improperly charged for the cost of his criminal prosecution. He relies on *People v. Burnett* (1978) 86 Cal.App.3d 320 (*Burnett*), *People v. Gangemi* (1993) 13 Cal.App.4th 1790 (*Gangemi*), and *People v. Torres* (1997) 59 Cal.App.4th 1 (*Torres*), to support his argument. Those cases involved attempts to directly reimburse public agencies for the costs of criminal prosecutions. None is applicable here.

*Burnett, supra*, 86 Cal.App.3d 320, involved a restitution order requiring reimbursement to the county for the cost of extraditing defendant as a condition of probation. The court held that unless the government was a direct victim of the crime, the court could not impose a probation condition of repayment of the costs of prosecution and probation supervision.<sup>2</sup> (*Id.* at p. 322.)

Similarly, *Torres, supra*, 59 Cal.App.4th 1, involved an order of restitution requiring defendant to reimburse the police for money spent by undercover agents to buy drugs from defendant. Noting that the sheriff's deputies received what they paid for, the Court of Appeal struck the order. (*Id.* at pp. 2-3, 5.) The rationale for the result in *Torres* was that the police agency was not a direct victim for purposes of restitution. (*Id.* at p. 5.) No payment to a government agency is involved in defendant's case.

In *Gangemi, supra*, 13 Cal.App.4th 1790, the trial court imposed the maximum fine of \$75,000 for each count of filing a false deed of trust. When it imposed the fines, the trial court stated that it was doing so for the express purpose of making the defendant

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<sup>2</sup> *Burnett, supra*, 86 Cal. App.3d 320, was at least partially superseded by legislative approval of imposing the costs of probation supervision as a probation condition. (See *People v. Washington* (2002) 100 Cal.App.4th 590, 595.)

pay for the cost of his prosecution. (*Id.* at p. 1796.) The Court of Appeal held that no statute authorized imposition of costs of prosecution as a component of a fine and sent the case back for reconsideration of potentially valid reasons for imposing the fine. (*Id.* at pp. 1798-1799.) The costs imposed here were not assessed for the purpose of paying for the criminal prosecution.

The cited cases have no application to a restitution order for fees of a private attorney retained by the victim to investigate and recover embezzled funds and property. Holt was never hired or paid by the prosecutor. She testified that her strategy for recovering the funds, in light of her corporate client's limited budget, was to gather enough information to convince the district attorney's office to institute a criminal prosecution. This is a valid tactic for a private attorney representing any client, but especially when representing a nonprofit entity.<sup>3</sup> Holt's work saved money for Clinic Ole by making the expensive civil action unnecessary. She was in no manner performing a function of government and did not participate in the prosecution of the case.

Defendant's reference to Holt's statements about preparing witnesses and "handholding" of witnesses were explained by Holt during the restitution hearing. Because her client was a corporation, with several officers and responsible employees, Holt served as what she termed a "conduit" between the prosecutor's office and her client. She gathered questions and information from the client's employees and conveyed them to the prosecutor. When witnesses were subpoenaed, they called Holt with questions about procedure and she advised them on how to approach the hearings. Merely serving as the spokesperson for her client does not transform her into an agent of the prosecutor. Holt was not engaged in trial preparation on behalf of the prosecutor, but was representing her client.

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<sup>3</sup> (See, e.g., California Attorney General's Guide for Charities (1988) <<http://caag.state.ca.us/charities/publications/aggfc.pdf>> [as of Aug. 9, 2004] at p. 16 [noting that directors of public charity have duty to take reasonable steps to recover embezzled funds including hiring private attorney and referring matter to local prosecutor].)

Defendant ignores the distinction between reimbursing the prosecutor's office for doing its job and reimbursing a victim's private counsel for legal services necessitated by the commission of the crime. In *People v. Lyon* (1996) 49 Cal.App.4th 1521, an embezzlement case, the defendant argued that restitution for private legal fees could only be awarded in a civil action. The court made a distinction between restitution for attorney fees incurred while resisting a criminal defendant's attempts at discovery in the criminal action and fees incurred by the same attorney in attempting to preserve defendant's assets for future collection. (*Id.* at pp. 1525-1526.) The court reasoned that the loss occasioned by hiring private counsel to oppose discovery efforts in the criminal case did not result from the criminal conduct, but from defendant's defense against the charges.

In *People v. Maheshwari* (2003) 107 Cal.App.4th 1406 (*Maheshwari*), another embezzlement case, the defendant pleaded guilty to charges of grand theft after losing a civil action by the employer. (*Id.* at p. 1408.) The criminal court imposed restitution that included payment for an investigator's fees and attorney fees not covered by the civil judgment. The defendant argued that the employer was required to use public prosecutors and investigators to recover the embezzled funds and that restitution for such costs was improper in the criminal action. The court held that restitution under section 1202.4 must be in an amount to fully reimburse the victim and that investigator and attorney fees were a "proper, necessary, and a logical result of appellant's criminal conduct." [Citation.] (*Id.* at pp. 1409-1410.)<sup>4</sup>

Clinic Ole, a nonprofit entity, was the direct victim of defendant's crime. In addition to its economic losses, it incurred losses for investigation and legal advice. Such losses are a result of the defendant's criminal conduct and are proper components of a restitution order. (See, e.g., *People v. Ortiz* (1997) 53 Cal.App.4th 791, 797-798

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<sup>4</sup> The court in *Maheshwari* properly distinguished *People v. Friscia* (1993) 18 Cal.App.4th 834 (*Friscia*), which struck an order for restitution of lost wages for time spent by employees assisting the police by preparing an accounting because *Friscia* concerned a different restitution statute and turned on the meaning of lost wages. (*Maheshwari, supra*, 107 Cal.App.4th at p. 1410 & fn. 3.)

[nonprofit trade association may recover restitution for expense of assisting police in investigating crime].)

In this case, Holt was not participating in the criminal proceeding against defendant. Her actions were taken in her role as counsel to the victim in the course of attempting to recover funds taken by defendant. She protected her client's interest by pursuing the appropriate investigations to support the civil action as well as to convince the prosecutor that a crime had been committed and by advising her client throughout the criminal process.

The trial court did not abuse its discretion by including Holt's entire fee in the order of restitution.

#### The Order Was Not an Abuse of Discretion

Defendant contends that the restitution order is unreasonable because Holt performed the investigation herself, rather than hiring outside investigators. He attacks the claims of the four Clinic Ole employees who testified at the restitution hearing in support of \$21,155.42 in employee time as being unsupported by written time records and based on general estimates. We reject these contentions.

“When considering a trial court's restitution determination, we consider whether it is arbitrary, capricious, or beyond the bounds of reason under all the circumstances. [Citation.] ‘Thus, while the amount of restitution cannot be arbitrary or capricious, “there is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action. . . .” [Citation.]’ [Citation.]” (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1275-1276.)

A trial court is required to use a rational method in computing restitution. (*People v. Harvest* (2000) 84 Cal.App.4th 641, 653.) The trial court does not abuse its discretion when there is a factual or rational basis for the amount of restitution ordered. (*People v. Hudson* (2003) 113 Cal.App.4th 924, 927.)

As to Holt's performance of the investigation, the evidence establishes that Holt had specific expertise in fraud and embezzlement. Her professional knowledge and



experience included the location and tracking of embezzled funds. Her investigation included interviewing victims of defendant's other embezzlement schemes, locating defendant's multiple accounts (some of which were in Canada) and levying on the accounts. Nothing about the nature of the services Holt performed was unreasonable.

Regarding the lack of written time records to substantiate the hours claimed by the employees of Clinic Ole, the record established without contradiction that the subpoenas defendant issued to the witnesses did not request that records be brought to the hearing. The employee witnesses testified as to the method they used to determine the amount of time spent investigating defendant's activities. Holt advised the employees of Clinic Ole to develop a methodology for determining the hours they spent on this matter and multiply the hours by their salary.

Pamela Harris, Clinic Ole's chief financial officer, testified that she estimated that 90 percent of her working hours in the early months after discovering defendant's actions were spent researching and investigating the loss. Her investigation included such things as locating the fictitious name used by defendant to sell the computers to Clinic Ole and locating the vendors who sold the equipment to defendant.

Esperanza Vargas, the bookkeeper, testified that she spent 30 hours on the investigation of defendant's thefts. She was involved in tracing defendant's transactions. She estimated her hours based on the fact that during the first week after discovery of the thefts almost all of her working time was devoted to this matter.

Beatrice Bostick, the executive director of Clinic Ole, estimated that she spent a total of 65 hours on this matter, based on her review of her appointment book and the dates of court appearances.

Stacey Dahlin, the assistant director, estimated that the whole investigation took place over 43 to 44 days. According to her best recollection, she estimated the time she spent on the matter as approximately the equivalent of 21 full days.

Estimating time spent based on calendar entries, appointment books and individual recollection is a rational method of ascertaining the time spent by Clinic Ole's paid employees on investigation necessitated by defendant's crime. Substantial evidence

supports the trial court's exercise of its discretion in ordering the amount of restitution necessary to fully reimburse the victim for losses caused by defendant's conduct.

#### CONCLUSION

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Margulies, J.